80-1655 No.

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In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Whether the court may permit receipt of testimony as to longshoremen's violations of OSHA regulations and not charge the jury that the shipowner's scienter of such violations renders the shipowner liable to the longshoremen?

PARTIES

Petitioner in the action is Oscar Waring. Respondent is Kalgrad Navigation Company, Inc.

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No.

In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on October 31, 1980 and denial of petition for rehearing en banc on December 8, 1980.

OPINIONS BELOW

No opinion has been filed by any of the courts below. A direct appeal was taken to the United States Court of Appeals for the Third Circuit from the judgment entered in the District Court on the verdict on February 29, 1980. The Court of Appeals for the Third Circuit denied oral argument and affirmed the court below by a per curiam order dated October 31, 1981. A petition for rehearing en banc filed by petitioner was denied on December 8, 1980. The order of the said Court of Appeals affirming the court below and the denial of the petition for rehearing en banc are included in the appendix at pages 1a and 3a respectively.

JURISDICTION

The denial of the petition for rehearing of the order affirming the court below by the United States Court of Appeals for the Third Circuit was entered on December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is the Longshoremen and Harbor Workers Act, 33 U.S.C. §901, *et seq.*

STATEMENT OF THE CASE

Petitioner was a longshoreman employed by a contracting stevedore, Delaware Operating Company. He was injured on April 24, 1976 in the Port of Philadelphia aboard the S/S Van Union, a vessel owned and operated by the respondent shipowner.

On January 18, 1978, petitioner filed a complaint in the United States District Court for the Eastern District of Pennsylvania; stating that on April 24, 1976 he was caused to sustain personal injuries by reason of the negligence of Kalgrad Navigation Company ("Kalgrad") while he was working aboard the vessel, the S/S Van Union. The answer of the respondent Kalgrad denied any negligence on its part and alleged that any injuries which the petitioner had sustained were caused by petitioner's own negligence and by the negligence of petitioner's employer, Delaware Operating Company, an independent contractor stevedoring company which had been hired to discharge cargo from the vessel in Philadelphia.

The matter was tried before the United States District Judge Clarence J. Newcomer and a jury. It was tried on all issues including damages. The jury found, the issues having been submitted to the jury on interrogatories, that the respondent was not negligent. The interrogatories provided that upon such a finding the jury need not reach causation or damages. Judgment was entered on the verdict in favor of the respondent on February 29, 1980.

In lieu of filing post-trial motions, petitioner filed a notice of appeal to the Court of Appeals for the Third Circuit on March 26, 1980.

The appeal was grounded upon the charge of the court as to the duty of care of the shipowner under the Longshoremen and Harbor Workers Act, 33 U.S.C. 901, *et seq.* The charge included Section 343 of the Restatement of Torts 2d, a standard that had been previously rejected by the Court of Appeals for the Third Circuit and by the Court of Appeals for the Ninth Circuit as including elements of assumption of the risk. In addition, it was

claimed that the court's receipt of testimony as to OSHA,[1] regulations required a charge from the court that the violation of OSHA regulations by the stevedore does not exculpate the vessel owner. Petitioner claimed that the court erred in not charging that to the extent that the vessel owner had scienter the vessel owner may be found to be negligent by the jury.

The Court of Appeals for the Third Circuit did not afford petitioner oral argument and affirmed the court below by a per curiam order dated October 31, 1981 (1a). Petition for rehearing en banc was denied on December 8, 1980 (3a).

The S/S Van Union, a vessel owned and operated by the respondent, carried the Liberian flag. Respondent is a corporation organized under the laws of Liberia.

On April 24, 1976, the S/S Van Union came into the Port of Philadelphia with steel products, including steel pipe of large diameter. The vessel had been loaded in various ports in Japan with these steel products. Petitioner was a member of the "Lyles" gang which had been assigned to the number 4 hatch of the vessel. Only the forward part of that hatch had cargo. The vessel had no tween deck and consisted of a large general hold from the weather deck down to the floor of the hold.

The cargo in the forward part of the number 4 hold consisted of steel pipe stowed fore and aft on top of beams and other steel products. The Lyles gang of which the petitioner was a member was confronted with a stowage problem that made discharge difficult. No dunnage had been placed between the layers of pipe thus creating a serious hazard. It was necessary to

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1. Occupational Safety and Health Act of 1970, 29 C.F.R. §1918.1, *et seq.*

bar the pipe to elevate it from its point of rest so that a breakout wire could be placed underneath it. The breakout wire would then be utilized to lift the pipe sufficiently to put a lumber bridle under the pipe in order to take the pipe from the hold to the pier side. The top of the pile of pipe was approximately eleven to twelve feet above the floor of the hold.

Mr. Lyles, the foreman, decided it was necessary to put a forklift truck down in the clear part of the after end of the number 4 hold because absent dunnage it was not possible to bar the pipe apart so as to put breakout wire between it. The forklift truck was utilized by having the forklift come in at a 45-degree angle and, with one blade going underneath the pipe, raising it up to get a strap underneath it.

Mr. Lyles testified that when dunnage was not used, it was customary to have the cargo come in pre-slung, that is, with wire put around the pipe at each end prior to the loading of the steel pipe at the loading port so that neither breakout wire nor bridles would be necessary. However, none of the cargo in the number 4 hatch on April 24, 1976 had been pre-slung.

When rain started a mate was asked to cover the hatches. This was asked so that moisture would not make the steel slippery. The mate, other than some nondescript manual indications, did nothing.

When petitioner was trying to place the bridle underneath a draft of pipe which had been raised by the forklift truck, he was dislodged from the pile by another piece of pipe that started to roll. The petitioner fell some eleven to twelve feet from the top of the pile to the deck of the lower hold in number 4 hatch, and was removed in an unconscious state from the hold to the dock by the use of the ship's derrick.

Mr. Lyles expressed the opinion that the condition of the stow as it came to the Port of Philadelphia from the standpoint of discharging the cargo was not safe. He also testified that a refusal to work and walking off the ship would endanger the longshoremen's jobs. He had utilized the forklift truck to raise the pipe in order to put a breakout wire underneath as his best solution to the dilemma.

Even after the accident, the longshoremen continued to use the forklift truck in the same way.

William Collins, a longshoreman for approximately eighteen years who had covered the entire spectrum of longshore work including gangboss and shipboss, was called by the petitioner as an expert. He had handled cargo similar to that described by Mr. Lyles, both from a discharging and loading aspect. He was asked what were the essentials in stowing cargo such as steel pipe and tubing. Mr. Collins pointed out that among the important factors was the necessity to take the cargo out safely. While he did not approve the use of the forklift truck, he also rejected the alternatives suggested by counsel for the respondent as equally dangerous.

He reiterated the need for either dunnage or a chock to provide a small space to slide in the breakout wire which would then lift the pipe sufficiently high enough to put the necessary bridles around it. Absent dunnage, the only other safe procedure would be pre-slung cargo; that is, cargo already wrapped in wire and slings so that it may be merely hooked up and taken out immediately. He further testified that he had always loaded this type of cargo either in pre-slung condition or by the use of dunnage so that it may be discharged safely at subsequent ports.

Captain Cullen, a Master Mariner was also called as an expert for the petitioner. Captain Cullen testified that the

Master has the ultimate responsibility for the stowage of the cargo aboard the vessel and performs that function through his officers. He pointed out that the primary business of a vessel is to carry cargo from one port to another, and it was therefore concerned with the safe and proper stowage of the cargo. Proper stowage consists of several important elements, the first of which is planning. The planning stage is the amount of thought which goes into loading the cargo, the foremost of which is the safety of the vessel and the safety of the people who are going to work on that vessel and are going to be concerned with the loading and discharging of the cargo.

In the opinion of Captain Cullen, the steel pipe to be discharged in Philadelphia was not reasonably safe, absent the use of dunnage to provide for breakout wires. He summed it up that if dunnage had been used liberally throughout the cargo in the number 4 hatch, it would have provided for a systematic and safe discharge of that cargo by a method that is familiar and consistent with longshoring practices. Without the dunnage, longshoremen were forced to improvise when they used a forklift in order to lift up the pipe bundle to put in breakout wire. Captain Cullen was cross-examined on OSHA regulations and with particularity as to No. 1918.32(b) which was read to him, that "when an edge of a hatch section or of stow cargo more than eight feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances." He was also cross-examined on OSHA regulation 1918.91(c) which requires that slippery conditions be eliminated as they occur. There had been a contention by the petitioner that the moisture from the rain had made the pipes slippery. Respondent countered with testimony that there was satisfactory dunnage and denied the rain.

Among the experts called by the respondent was Joseph F. McGowan, General Manager of Stevedoring for Delaware Operating Company, who was the petitioner's employer. His offered as an expert testifying on behalf of the respondent. His opinions convicted his own company of unsafe practices by the use of the forklift truck. He also opined that the stevedore was doing the discharging in an unsafe manner.

Cross-examination of Mr. McGowan revealed that he had no hold experience, that he had worked on the wharf, and then as a timekeeper and then went into management. He admitted that he had not been on the S/S Van Union, and that he had not seen the cargo. He admitted that water on naked steel makes it slippery. He admitted that if the pipe got wet he would not under any circumtances dispatch longshoremen to suddenly smear the pipe with Dri-All. He admitted that he would not expect longshoremen to scatter sawdust on the top of the pipes if the pipes had been rained on, but would wait for the pipes to dry. He admitted on cross-examination that loading a vessel is under the control of either the ship's officers or a super cargo, that is, a port captain accompanying the vessel. He admitted on cross-examination that his records indicated that it did rain and that it had rained on April 24, 1976.

REASONS FOR GRANTING THE WRIT

The charge by the court that a violation of OSHA regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law and in conflict with the Court of Appeals for the Ninth Circuit.

The court permitted testimony *in extenso* regarding the safety and health regulations for longshoring which were characterized as OSHA rules. Petitioner's experts were cross-examined on the activities of the stevedore and whether they

violated the OSHA regulations. Respondent's experts gave their opinion that the activities of the longshoremen did violate the OSHA regulations and it was the violation of the OSHA regulations that was the sole cause of the accident.

The court's charge was explicit on this point:

> "You have heard testimony regarding the safety and health regulations of longshoring. They apply only to stevedoring companies and they are rules, the so-called OSHA rules, which the stevedoring companies such as plaintiff's employer must follow in conducting their work aboard vessels. If you find that plaintiff's employer failed to follow these regulations and that this failure was the sole cause of the accident, then you must find for the defendant."

This charge is contrary to the laws expounded by the Court of Appeals for the Ninth Circuit in *Bachtel v. Mammouth Bulk Carriers Ltd.*, 605 F. 2d 438-44 (9th Cir. 1979),[2] which discussed the precise question of violations by the longshoremen of the requirements of the Safety and Health Regulations for Longshoring (29 C.F.R. §1918.2, *et seq.*).

Involved in that case was the precise code section that was involved in the instant case namely, 29 C.F.R. §1918.32. This section of the code provides:

> "(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that is presents a danger of an employee falling, the edge shall be guarded by a safety net or (sic)

2. Petition for certiorari pending

> adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

As the court pointed out in *Bachtel* prior to the 1972 amendments to the Longshoremen and Harbor Workers Act, it was well-settled that a violation of the regulations was an indicia of negligence on the part of a vessel owner which if such negligence was a proximate cause of a longshoreman's injuries imposed liability upon the vessel owner. This Court had denied certiorari in *Provenza v. American Export Lines, Inc.*, 324 F. 2d 660 (4th Cir. 1963) and this principle was followed in the Second Circuit in *Reid v. Quebec Paper Sales & Transportation Co., Ltd.*, 340 F. 2d 34 (1965), and in the Fifth Circuit in *Marshall v. Isthmian Lines, Inc.*, 334 F. 2d 131 (1964). *See also, Venable v. A/S Det Dorenede Dampskibsselskab*, 399 F. 2d 347, 353 (C.A. 4, 1968).

The Court of Appeals for the Ninth Circuit then wrestled with the question as to whether or not the enactment of the 1972 amendments changed this doctrine. The court examined the post-amendment cases, *Chavis v. Finnlines, Ltd. O/Y*, 576 F. 2d 1072, 1082 (C.A. 4 1978), *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (C.A. 5 1977) and *Brown v. Ivarans Rederi A/A*, 545 F. 2d 854 (C.A. 2 1976), which seemingly support the conclusion that a violation of the regulations cannot be utilized by a longshoreman against a shipowner. The Court of Appeals for the Ninth Circuit in *Bachtel* concluded that these cases are fatally flawed with a basic error and an unwarranted interpretation of the regulations, when it said:

> "Although §1918.2 makes it clear that the regulations do not place *additional responsibilities or duties* on owners, operators, and others, it likewise makes it crystal clear that

> the regulations do not relieve the owners, operators, or masters from responsibilities or duties then placed upon them by law, regulations, or custom. The designing of a 20-30 foot deck load of logs without adequate safeguards at the sides could well have been viewed as evidence of negligence under the *law* as it exists prior to 1972. This design along with the failure to provide protective nets or other devices would be presented to a jury under the customary definition of negligence. That is to say, the regulations here required nothing more than the due care required under the doctrine of negligence as it existed in maritime law prior to 1972.
>
> We must assume that Congress was aware of the *Provenza, Bolenski* and *Venable* decisions, which held that the regulations applied to negligence on the part of the shipowner, at the time it passed the 1972 amendments. The negligence mentioned in 33 U.S.C. §905(b), therefore, would necessarily include a violation of the then existing law and regulations, including §1918.32(b), the subject of the court's instruction challenged by appellant. *See Shapiro v. United States,* 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); *Allen v. Grand Central Aircraft Co.,* 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954)." (at 445).

In *Lawson v. United States,* 605 F. 2d 448, 452 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit reiterated its position that a vessel owner is liable for a ship repair contractor's non-compliance with the safety and health

regulations for ship repairing. 29 C.F.R. §1915.43(e), §1915.47, §1915.51(a), (c), and §1915.54. These rules are parallel rules to those relating to longshoremen and the logic is equally applicable.

We have included in the appendix herein at 4a-5a, two pages of the cross-examination of Captain Cullen, an expert witness for the petitioner, which demonstrates the pivotal effect on the jury's questions of the alleged violation of the regulations by the stevedore. The pivotal effect is heightened when the petitioner's employer through its general manager, testifies as an expert for the respondent, and convicts his own company of these violations. The pivotal nature of the charge is also highlighted by the very manner in which the court charged. Despite the fact that interrogatories were submitted requiring the jury to answer seriatim questions as to negligence and causation, the language speaks in the sense of a general verdict.

In the instant case, the OSHA regulations should not have been permitted as a basis for exonerating Kalgrad. The contentions as to the improper stowage and the lack of proper planning made irrelevant any violations of OSHA regulations as exculpatory. It permitted a ground swell of confusion as to the implications of violations of OSHA regulations. Nothing the court charged made clear that the violations of OSHA regulations by a stevedore in attempting to meet a stowage problem does not exculpate the shipowner. It could have served as an independent basis of liability of the shipowner. It could have served as a demonstration that in planning the stowage of the vessel and creating the hazard of which the plaintiff complained, that the vessel owner should have foreseen that the stevedore might violate OSHA regulations. In the context in which it was introduced and the manner in which it was utilized,

the jury was led to believe that if the stevedore violated an OSHA regulation, the vessel owner was thereby insulated from liability.

The charge of the court as to the duty of care of the shipowner was a melange of the new-found standard of care as set forth in *Griffith v. Wheeling — Pittsburgh Steel Corporation,* 610 F. 2d 116 (3rd Cir. 1979) and §343 of the Restatement of Torts, 2d. Petitioner, in its points for charge, asked the court to charge *Griffith v. Wheeling — Pittsburgh Steel Corporation, supra,* and the court so did. The respondent asked the court to charge no. 45 of respondent's points for charge which the court also covered. This point reads:

> "The shipowner is under no duty to warn the stevedore of dangers or defects which are (1) open and obvious or (2) are known to the stevedore or his employees, or (3) which could readily be observed or discovered by said employees in the exercise of ordinary care during the performance of their work. *Hite v. Maritime Overseas Corporation,* 380 F. Supp. 222 (E.D. Texas 1974); *Frasca v. Prundential Grace Lines,* 394 F. Supp. 1092 (D. Md. 1975); *Fisher v. Norships Freighters, Inc.,* 1975 AMC 1622 (E.D. Pa. 1975)."

Hite v. Maritime Overseas Corporation, 380 F. Supp. 222 (E.D. Texas 1974) and *Frasca v. Prudential Grace Lines,* 394 F. Supp. 1092, 1100 (D. Md. 1975) are cited by the respondent in support of their point of charge no. 45 and are pure embodiments of §343 of the Restatement of Torts, 2d.

The *Griffith* court held that the minimum requirement of the reasonable standard of care for a vessel owner is as follows:

> "*At a minimum,* we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. See *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d at 485." At page 126. (emphasis supplied).

It further held that the fact that the stevedore chose a method of operation which may have been negligent, does not relieve the vessel owner of its responsibilities (at page 127).

The fact that the longshoreman may have violated the OSHA regulations is not dispositive of the vessel owner's fault, and, therefore, to charge the jury that if the stevedore were in fact in violation of the OSHA regulations then the shipowner could not be liable, was erroneous as a matter of law.

The charge of the court on OSHA regulations doomed the parallelism deemed by Congress to be necessary for the protection of longshoremen. *Edmonds v. Compagnie Generale Transatlantique,* 61 L. Ed. 2nd 521, 530-31 (1979).

CONCLUSION

In sum total, a longshoreman seriously injured has been impaled upon a violation of OSHA regulations by his employer by a charge that permits such violations to relieve the vessel owner dispute scienter of his parallel duty to take all steps necessary for the safety of those who labor in the service of the vessel.

For the above-stated reasons, it is respectfully prayed that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1514

WARING, OSCAR,

Appellant

vs.

KALGRAD NAVIGATION CO., INC.

Appeal from the United States District Court for the Eastern District of Pennsylvania D.C. Civil Action No. 78-0186

Submitted Under Third Circuit Rule 12(6)
October 15, 1980

Before: HUNTER, WEIS, *Circuit Judges,* and FISHER,* *District Judge*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

---

* Honorable Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

Judgment Order

Costs taxed against appellant.

BY THE COURT,

s/ James Hunter, III
JAMES HUNTER, III
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, *Clerk*

DATED: Oct. 31, 1980

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1514

WARING, OSCAR,

Appellant,

v.

KALGRAD NAVIGATION CO., INC.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter, III
Judge

Dated: December 8, 1980

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at p. 4-42]

". . . what other means providing equal protection under existing circumstances would you prescribe? A. I really can't thhink of any. I really can't think of any right now, Mr. Mahoney.

Q. Well, have you ever seen a stevedoring operation in which the stevedore has to discharge a height of steel, bundles of pipe more than 8 feet high? A. Well, no, I have never had experience with a height of pipe like that, as I have said, so I have never seen that operation.

Q. Not 12 feet high but just more than 8. A. More than 8 feet high. No, I don't think so; no.

Q. And it wouldn't make any difference, would it, whether or not there was dunnage between the bundles of pipe, this regulation would still apply as long as the stow was more than 8 feet high, isn't that correct? A. It would be a much safer stow with the dunnage in between the pipes.

Q. That is not what I asked you, Captain. It would not make any difference insofar as this regulation is concerned, would it? A. Not insofar as the written words of the regulations are concerned, no.

Excerpts of Transcript of Proceedings

Q. Well, that is how we perpetuate regulations, is by putting them in written words, don't we, Captain? [4-43] A. Correct, but —

Q. And they are — when the regulation is prescribed, when it's promulgated it has the force of law, does it not? A. Yes, it does.

Q. And it has to be obeyed? A. Yes, it does.

Q. By the stevedore. A. Well, that is what the regulations say; yes.

Q. That is what the regulations say, right.

As a matter of fact, there is another regulation that deals with slippery conditions, is there not? A. Yes.

Q. Do you know what that says? A. No, I can't give you the exact wording of the regulation.

Q. Well, that is 1918.91(c); a section which ddeals with housekeeping, and it says: Slippery conditions shall be eliminated as they occur.

Are you familiar with that wording? A. Yes.

Q. Now, that means that if the stevedore is confronted with the situation where his men must work under conditions which we would describe as slippery, they. . . ."

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KALGRAD NAVIGATION COMPANY, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioner Waring's Statement of the Case is little more than a labored recitation of the discredited allegations which he made at trial.

This was a credibility case. Waring claimed that the accident had been caused by three factors: (1) absence of any dunnage between the bundled pipe; (2) large amounts of pipe which had been deliberately broken out of bundles during stowage in Japan; and (3) the failure of the ship to close the hatch when supposedly requested to do so by the longshoremen during an extensive and heavy period of rainfall.

Over the course of an 8-day trial, Respondent Kalgrad refuted every one of Plaintiff's negligence contentions and demonstrated: (1) that the cargo was, in all respects, properly and adequately stowed and dunnaged in accordance with the custom of the trade; (2) that the strip dunnaging which is customarily used is inevitably compressed and reduced to debris during the voyage by the tremendous weight of a steel stow and that consequently, such dunnaging can never be expected to serve a function with respect to the discharge of the cargo; (3) that there had been no deliberate breaking of pipe from bundles during stowage in Japan; [1] (4) that there had been no heavy or continuous period of rainfall on the morning of the

1. Waring contended that he was standing on loose pipe which rolled under his feet and caused him to topple from the stow. His hatch foreman, Lyles, estimated that as much as 30% of the cargo had been intentionally broken out of strapped bundles during stowage in Japan. This testimony, which Waring has chosen not to recount in his statement of the case, was irrebutably refuted by photographic evidence: In Baltimore, the preceding port, a surveyor had taken a photograph of the cargo in the No. 4 hatch, including the cargo bound for Philadelphia. This showed that the Philadelphia cargo was neatly in place, with all of the pipe in clearly formed bundles.

accident;[2] (5) that the stevedore was not compelled by any circumstances caused by Kalgrad to adopt the unsafe[3] method of using the forklift to discharge the cargo; to the contrary, the stevedore had at its disposal, but chose to ignore, several methods of getting the cargo out safely under the existing circumstances.[4]

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2. Waring and his hatch foreman described a veritable deluge which lasted about one and a half hours and which required the men to stop work, flee the hatch, and seek shelter elsewhere on the ship. The stevedoring company's General Manager testified that under such circumstances, his company's time records would show any work stoppage in excess of 15 minutes. The stevedore's records for the date of the accident showed that there had been no work stoppage on account of rain at any of the several hatches which were being worked by longshoremen.

3. Even Waring's experts, Collins and Cullen, agreed that the stevedore's election to use the forklift truck was an improper and unsafe stevedoring method. Cullen and hatch foreman Lyles both admitted that the selection of appropriate equipment for use in the discharge operation was exclusively within the province of the stevedore. Even Lyles, who had decided to use the forklift in the first place, admitted that he was unable to get a good purchase under the pipe by means of the forklift blades, and that he was always concerned that the pipe would slide off of the blades.

4. On cross examination, hatch foreman Lyles conceded that when discharging bundled pipe, it is customary to take heavy pieces of wood known as "bearers" and to place them under the raised bundles before the winch sets the bundles down again. The use of bearers is designed to prevent the men from having to approach a bundle during any period of potential instability. Once the bearers are in place, the bundle is loaded onto them so that the men can then safely approach the cargo in order to position the discharge wire. The proper procedure is for the longshoremen to make an initial, short lift of one end of the bundle, just sufficient for the men to toss bearers beneath the pipe. The short lift can be accomplished either by means of a breakout wire (which does *not* have to be placed beneath the bundle—it is merely woven around a few of the protruding ends of the pipe in the bundle) or

During the Charge, the Trial Court reviewed in detail each of Waring's negligence contentions. The Court went on to instruct the jury:

> "° ° ° you may find the defendant liable upon a showing of the following: First, that the vessel knew or by the exercise of reasonable care could have discovered a condition on board ship that led to the injury; second, that the vessel owner knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen working on board the ship; third, that the vessel failed to exercise reasonable care to protect longshoremen against that danger, if any.[5]
>
> It was the continuing duty of the defendant shipowner at the time and place of the accident in question to use ordinary care under the circumstances to furnish the plaintiff a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the

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4. (Cont'd.)

by means of specially designed pipe hooks. Lyles admitted that the stevedore had pipe hooks available for this purpose, but claimed that he decided not to use them because of the alleged presence of enormous amounts of loose pipe in the stow. Incredibly, Lyles did not even have the men toss bearers beneath the pipe when he raised the ends of bundles by forklift; instead, he had the men pass the discharge wire beneath the bundles while they were precariously resting on the forklift blade. The accident occurred as Waring was waiting for his partner to toss him the wire. The pipes fell off of the forklift blade and Waring, apparently trying to avoid being hit, fell over the edge of the cargo to the deck of the hatch.

5. Following *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (3d Cir. 1979); *vacated and remanded*, — U. S. — (No. 79-813, May 4, 1981).

place of work in a reasonably safe condition. * * *" (1054a).[6]

Under this excessively[7] broad statement of care—a charge extraordinarily favorable to Waring—the jury would have been compelled to find Kalgrad negligent had it believed even one of Waring's negligence contentions. Special Interrogatories were put to the jury segregating the issues of negligence and causation. The jury never had to reach the question of causation because it found, plainly and simply, that Kalgrad had not been negligent.[8]

With good reason, the jury did not believe Waring. The Court of Appeals for the Third Circuit, with the benefit of extensive Briefs from both parties and the full trial record, clearly recognized this when it affirmed the judgment of the District Court by per curiam Order.

Waring's Statement of the Case, in spite of its obvious bias, serves one very useful purpose for this Court: It is absolutely silent as to the one point of evidence which would have a bearing on the question which Waring says is before this Court, i.e., that Kalgrad had "scienter" of the stevedore's violation of the OSHA Regulations.[9] There is no mention of any such evidence because none existed. For that reason alone, the Petition should be denied.

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6. Page references are to the Appendix to the Briefs filed in the Third Circuit.

7. *Scindia Navigation Co., Ltd. v. De Los Santos,* — U. S. — (No. 79-512, April 21, 1981).

8. Waring tries to evade the fact that the jury finding of no negligence represented a repudiation of his factual contentions with the mystical pronouncement that "Despite the fact that Interrogatories were submitted requiring the jury to answer seriatim questions as to negligence and causation, the language speaks in the sense of a general verdict." *Petition* at 12.

9. *Safety and Health Regulations for Longshoring,* U. S. Dept. of Labor, 29 C. F. R. §§ 1918.1 *et seq.*

ARGUMENT

I. Nothing in the Record Raises the Question Presented in the Petition.

Waring frames the sole question presented in his Petition as follows:

> "Whether the Court may permit receipt of testimony as to longshoremen's violation of OSHA regulations and not charge the jury that the shipowner's scienter of such violations renders the shipowner liable to the longshoremen?"

Petition at *i.*

As noted previously, there was not a shred of evidence presented at trial to support the notion that Kalgrad had "scienter" of the stevedore's violation of applicable OSHA Regulations.[10] Tellingly, in his argument (*Petition* at

10. The following provisions of 29 C. F. R. § 1918 were admitted into evidence:

1918.2(a): "The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in § 1918.3(c)."

1918.2(b): "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

1918.3(a): "The term 'shall' indicates provisions which are mandatory."

1918.3(c): "The term 'employer' means an employer any of whose employees are employed in whole or in part, in longshoring operations or related employments, as defined herein

8-14), Waring never even discusses the one issue which he raises for this Court's consideration. To the contrary, Waring uses a scattergun to attack a variety of other imagined insufficiencies in the record below.

II. Petitioner Has Misread the Very Portion of the Charge Upon Which He Relies.

Petitioner summarizes his argument as follows:

> "The Charge by the court that a violation of OSHA Regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law and in conflict with the Court of Appeals for the Ninth Circuit."

Petition at 8. Petitioner concludes that "to charge the jury that if the stevedore were in fact in violation of the OSHA Regulations then the shipowner could not be liable, was erroneous as a matter of law." *Petition* at 14.

Again, Petitioner argues against a principle which is not even raised in this case. The scant portion of the Trial Court's Charge quoted by Petitioner (at p. 9) merely states that where the stevedore's violation of OSHA Regulations "was the *sole* cause of the accident, then you must find for the defendant." *Petition* at 9.

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10. (Cont'd.)

within the Federal Maritime Jurisdiction on Navigable Waters of the United States."

1918.32(b): "When an edge of a hatch section or of stowed cargo more than 8-feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

1918.91(c): "Slippery conditions shall be eliminated as they occur."

The Trial Court never charged, as Petitioner suggests, that the fact that the stevedore had violated the OSHA Regulations, standing alone, could serve as a basis for exonerating Kalgrad.

In fact, in the paragraph of the Charge immediately preceding the portion which Petitioner has quoted (at p. 9), the Trial Court charged precisely the opposite principle:

> "On the other hand, if plaintiff was not personally at fault, *he may recover for his injuries in full against a negligent shipowner even where the negligence of the stevedore, his employer, contributed to his injuries, as long as the defendant shipowner was in some measure at fault.* The plaintiff may not, however, recover from the shipowner if the accident was due solely to the negligence of his employer, or the defendant was not in any measure negligent." (1051-1052a) (emphasis added).

Petitioner has been equally disingenuous in failing to call to this Court's attention the following portion of the Trial Court's Charge:

> "There had been reference made to OSHA regulations relating to longshoremen which are binding upon the employer of longshoremen. However, as clearly stated in the law, the OSHA regulations do not add to or subtract from the duties of the vessel and its officers and crew as heretofore established by custom, law or practice." (1059a).

Petitioner is no more accurate when he states that "Respondent's experts gave their opinion that * * * it was the violation of the OSHA Regulations that was the sole cause of the accident." *Petition* at 9. Respondent's ex-

perts did not so testify, nor did Kalgrad so contend at trial. To the contrary, Kalgrad argued that a variety of factors coalesced to produce the accident, principally the stevedore's improvident election to use a forklift to raise the bundles of pipe from the stow instead of using breakout wires and/or pipe hooks for this purpose, and the stevedore's failure to employ bearers during the breakout procedure so that the men working atop the cargo would not have to approach a draft during a period of potential instability.

The OSHA Regulations were offered in order to apprise the jury of the stevedore's customary obligations in a discharge situation such as the one presented in this case. Obviously, the stevedore's failure to put up a safety net did not cause the accident. But the jury was entitled to know who had the responsibility to take such protective measures. For the very same reason, the jury was entitled to know that the stevedore was required to remedy slippery conditions as they occurred during the conduct of the work.[11] Waring presented no evidence that under law, regulation, custom, or contract, Kalgrad had any parallel responsibility to take the protective measures which *were* required of the stevedore under the OSHA Regulations.

This Court has recently held:

> "We are of the view that absent contract provision positive law or custom to the contrary * * * the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover

11. Patently, Kalgrad did not contend at trial that the stevedore's failure to remedy slippery conditions had caused the accident. To the contrary, Kalgrad's efforts were directed to demonstrating to the jury that the drenching rainfall claimed by Waring had never even occurred and that the purported slippery conditions never existed.

dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations."

De Los Santos, supra, Slip Op. at 15. (emphasis supplied in the original.)

By contrast, the Trial Court charged in this case that:

"It was the continuing duty of the defendant shipowner at the time and place of the accident in question to use ordinary care under the circumstances to furnish the plaintiff a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the place of work in a reasonably safe condition. If the shipowner has actual knowledge of a dangerous condition or if a dangerous condition is such as should have been known to the shipowner in the exercise of ordinary care under the circumstances, then the law imposes upon the shipowner the duty to give the longshoremen reasonable warning of such danger or to protect the longshoremen against that danger." (1054-1055a).

Petitioner got more from the Trial Court than he deserved. The Trial Court, as noted, explicitly instructed

the jury that Kalgrad had the obligation to provide the longshoremen with a reasonably safe place in which to work. But this Court has now held that no such obligation exists.

> "As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U. S. C. § 941, requires the stevedore, the longshoremen's employer, to provide a 'reasonably safe' place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. *The ship is not the common employer of the longshoremen and owes no such statutory duty to them.* * * *"

De Los Santos, supra, Slip Op. at 13 (footnotes omitted) (emphasis added).

Given the extraordinary extent to which the Trial Court's instructions favored Petitioner, the task for the jury in this case in resolving the liability issue was extraordinarily simple: If the jury had believed any of Waring's liability contentions, it would have returned a verdict in Waring's favor because Kalgrad would then have failed in its putative obligation to provide the longshoremen with a safe place to work. A verdict in Kalgrad's favor, in spite of the Charge which was given in this case should not lightly be disturbed.

III. Petitioner's Reliance on *Bachtel v. Mammoth Bulk Carriers, Ltd.* Is Misplaced.

In *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (9th Cir. 1979); *vacated and remanded,* — U. S. — (No. 79-538, May 18, 1981), the Ninth Circuit

held that under certain circumstances, evidence of the stevedore's obligations under the OSHA Regulations can be admitted, along with other evidence, to aid a jury in its determination of a vessel owner's alleged negligence under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b). 605 F. 2d at 446. In so holding, the Ninth Circuit relied heavily upon *Provenza v. American Export Lines, Inc.*, 324 F. 2d 660 (4th Cir. 1963), a pre-1972-Amendment case, which held that where negligent conduct of the stevedore, including violation of OSHA Regulations, was either known to or should have been known by a vessel owner, the vessel owner could be held liable to an injured longshoreman either for unseaworthiness or on grounds of imputed negligence. 324 F. 2d at 665.[12]

In the wake of this Court's decision in *De Los Santos*, the validity of the Ninth Circuit's *Bachtel* decision must be questioned. This Court has held:

> "[W]e cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore.' ' ' It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps

12. As conceded by the Ninth Circuit, the majority of the Circuits have limited application of the OSHA Regulations to stevedores and have held that they do not impose a duty on the shipowner. *Bachtel, supra*, 605 F. 2d at 444. It is noteworthy that the Fourth Circuit, which generated the *Provenza* decision, has itself disavowed *Provenza* as no longer having application following the 1972 Amendments. *Chavis v. Finn Lines, Ltd., O/Y*, 576 F. 2d 1072, 1082 (4th Cir. 1978).

> to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same * * *".

De Los Santos, supra, Slip. Op. at 11-12.

Aside from pointing to the fact that both this case and *Bachtel* involved, in different contexts, the same provision of the OSHA Regulations,[13] Petitioner never explains why he imagines *Bachtel* to be of value to him in this case.

In *Bachtel,* the Ninth Circuit stressed four factors which it apparently believed warranted imposition of liability on the vessel owner, on a *respondeat superior* basis for the stevedore's non-compliance with the OSHA Regulations: (1) the vessel dictated the methods employed by the longshoremen and directed the operative details of the stevedore's work; (2) the vessel was found to have actual knowledge that by reason of the loading method it had devised, the longshoremen were compelled to work near the edge of a dangerously high stow; (3) the vessel's crew worked alongside the longshoremen in lashing the cargo and were thereby exposed to the same dangers; (4) the vessel owner had actual knowledge that by reason of the design of the ship and by reason of the methods it had imposed upon the stevedore, the stevedore could not and would not be in a position to comply with the subject OSHA Regulations. 605 F. 2d at 443.

13. 29 C. F. R. § 1918.32, (relating to safety nets).

None of the four factors presented in *Bachtel* existed in this case. Kalgrad in no way directed the methods of the stevedore. To the contrary, the stevedore provided its own supervisory personnel, who alone selected the methods and equipment to be used in discharging the cargo. Kalgrad had neither actual nor constructive notice that the stevedore was not in compliance with the OSHA Regulations. Nothing about the stow, the vessel or any conditions imposed by Kalgrad prevented the stevedore from complying with the applicable OSHA Regulations, and the stevedore was, at all times, in a position to comply with the Regulations without any assistance from Kalgrad.

To the best that Respondent has been able to determine, Petitioner's thesis is that whenever a stevedore violates OSHA Regulations, such violation should be imputed to the vessel owner because "the vessel owner should have foreseen that the stevedore might violate OSHA Regulations." *Petition* at 12.

If vessel owners were to be held to the standard that Petitioner contemplates, they would be required to make conditions on their vessels virtually foolproof. Such a standard is at odds with this Court's interpretation of § 905(b) in that it fails to take into consideration the expertise and experience of the stevedore and the vessel owner's rightful expectation that the stevedore will perform its work properly without supervision by the ship. *De Los Santos, supra,* Slip Op. at 9, 13.

Petitioner has nothing to complain of because his proposed standard was covered in the charge given by the District Court. As Petitioner has conceded (at p. 14), the District Court charged in accordance with the standard of care which the Ninth Circuit adopted in *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (1979), and

which this Court rejected in *De Los Santos, supra.* The Trial Court instructed the jury that it could find Kalgrad liable if Kalgrad knew or should have known that a condition on the vessel posed an unreasonable risk of harm to the longshoremen working aboard the ship and that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. *See, Griffith v. Wheeling-Pittsburgh Steel Corporation, supra,* 610 F. 2d at 126.[14]

CONCLUSION

The jury refused to believe Petitioner's liability allegations. Petitioner lost at the trial level in spite of a Charge which was overly favorable to him. The Trial Court did not charge that violation of OSHA Regulations by the stevedore would permit exoneration of the vessel owner. The Court charged the contrary principle, i.e., that the vessel could be held liable even if the stevedore had also been negligent.

There was no evidence of Kalgrad's "scienter" of the stevedore's failure to adhere to OSHA Regulations. The

14. For the sake of thoroughness, it is worth noting that Waring has alleged that the Trial Court charged in accordance with § 343 of the Restatement (Second) of Torts. *Petition* at 3 and 13. That is not true. It is noteworthy that Petitioner quotes not from the Court's Charge but from a Request for Charge submitted by Respondent which Petitioner claims the Trial Court "covered". *Petition* at 13. Petitioner raised the same point on appeal before the Third Circuit. The Third Circuit, which had the full text of the Trial Court's Charge before it, had no trouble summarily rejecting Waring's argument. The Third Circuit had previously rejected application of Restatement § 343 in cases arising under the Longshoreman's Act in *Griffith v. Wheeling-Pittsburgh Steel Corp., supra.*

question said to be raised by Petitioner is not even presented in this case.

It is respectfully prayed that the Petition be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

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Opinion of the United States Court of Appeals For the Third Circuit in *Thomas W. Griffith v. Wheeling-Pittsburgh Steel Corporation v. American Commercial Lines, Inc.*.. 3a

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REASONS FOR GRANTING THE WRIT

The charge by the court that a violation of OSHA regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law.

The purpose of this reply brief is not to reargue the petition for certiorari but to preserve intact the crucial issue which petitioner believes justifies the granting of the petition for certiorari.

Respondent would reduce the result to a simple credibility issue. Credibility is always a function of the jury and as factfinder it must decide the issues in dispute. That there were issues of dispute is manifest from the petition and respondent's brief in opposition. Suffice to say there was evidence received by the court on both sides of every issue.

However, the court in its charge required the jury to find the facts in accordance with the law which the court rendered to the jury. Petitioner has quoted in its petition that portion of the charge of the court which required the jury to exculpate the shipowner if the stevedore violated OSHA regulations[1] and if this violation was the sole cause of the accident. Respondent has added other portions of the charge which petitioner submits does not alter the stark mandate. In the instant case it was not disputed that petitioner was working on the face of a cargo twelve feet high. In the course of the testimony the trial court permitted extensive cross-examination of plaintiff's experts on the OSHA regulations and stressed that they had the force of law and that the stevedore had violated that law. The managing executive of the stevedore testified as an expert for the vessel-owner and confessed violation of the same OSHA regulations and blamed the accident on the violation of the OSHA regulations. The relevancy of receiving testimony or permitting cross-examination on the OSHA regulations was properly challenged on the ground that it destroyed the parallelism which is implicit in *Edmonds v. Compagnie Generale Transatlantique,* 61 L. Ed. 2nd 521 (1979).

Respondent on page 8 of its brief states that the OSHA regulations were only offered to apprise the jury of the stevedore's customary obligations in a discharge situation but then goes on to state that obviously the stevedore's failure to put

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1. Safety and Health Regulations for Longshoring (29 C.F.R. §1918.2, *et seq.).*

up a safety net did not cause the accident. The jury was never told that. The court didn't so charge. The jury was left with the clear undisputed fact that the man had fallen off a twelve foot face of cargo and that the stevedore by law was required to put up a safety net should the face of the cargo be more than eight feet. The court did not charge with specificity that this would not exculpate the vessel-owner if they permitted the stowage in prior ports creating this situation which the stevedore by the admission of its managing officer handled so badly. We have included as an appendix hereto the context of the court's charge on this issue.

This Court recently in *Scindia Navigation Co., Ltd. v. De Los Santos,* ____ U.S. ____, 68 L. Ed. 2d 1 (April 21, 1981) discussed the obligations of the vessel-owner under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). In its wake this Court vacated and remanded *Bachtel v. Mammoth Bulk Carriers, Ltd.,* ____ U.S. ____, 68 L. Ed. 2d 835 (1981), 605 F. 2d 438 (9th Cir. 1979); *Griffith v. Wheeling-Pittsburgh Steel Corp.,* ____ U.S. ____, 610 F. 2d 116 (3d Cir. 1979), 68 L. Ed.2d 343 (1981); *Lawrence A. Sarauw v. Oceanic Navigation Corporation,* ____ U.S. ____, 68 L. Ed.2d 344, 622 F. 2d 1168 among others. Significantly it denied certiorari in *Ernst Russ Steamship Co. v. Matthews,* ____U.S. ____, 68 L. Ed. 2d 356 (1981), 603 F. 2d 676 (7th Cir.) and *Pittston Stevedoring Corp. v. Doca,* ____ U.S. ____, 65 L. Ed.2d 351 (1981), 634 F. 2d 30 (2d Cir.).

We have not yet been apprised as to the Ninth Circuit reconsideration of *Bachtel.* However the reconsideration in *Sarauw, supra,* and *Griffith, supra,* is in the opinion of the petitioner helpful.[2] In *Sarauw* the Court of Appeals for the Third Circuit in a case involving a gangway supplied by a

2. Slip Opinions attached hereto.

stevedore refused to divest the vessel-owner of its responsibility for safe securing and condition:

> "Here the stevedore, Hess, which was the owner of the marine terminal at which the ANDROS ATLAS was unloading, required all vessels unloading at its terminal to use only gangways supplied by it, the stevedore. Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in the sense that it was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land, We are, accordingly, satisfied that *Scindia* does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured longshoreman. (citations omitted)
>
> . . . In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading."

In *Griffith, supra,* the district court had found that prior to turning control over to the stevedore the barge owner knew or should have known what defects existed and had reason to believe that Wheeling-Pittsburgh Steel Corp. might use a negligent method of removing the defective hatch cover and took no steps to prevent harm to the longshoremen which was the foundation of liability on the part of the shipowner. Substituting defective stow for defective equipment then the instant case assumes familiarity.

In the wake of the *De Los Santos* decision the Court of Appeals for the Third Circuit recalled the mandate to permit a resubmission of a motion for reconsideration which had been previously denied in *Di Rago v. American Export Lines, Inc.,* 636 F. 2d 860 (3d Cir. 1980). The case is identical to the instant case in that the accident resulted from a dangerous stow in a prior port. An attempt was made in that case by the vessel-owner to avoid liability on the basis of an alleged violation of OSHA's Safety and Harbor Regulations for Longshoring. To this the court said:

> "Export places much reliance on the applicability of OSHA's Safety and Health Regulations for Longshoring, which impose on the stevedore who breaks down cargo the duty to take precautions, 'when necessary to prevent the remaining cargo from falling'. 29 C.F.R. §1918.83(b) (1979). However, the regulation does not by its terms preclude a finding that shipowner negligence also contributed to an accident by creating a latent danger. Indeed, to interpret the OSHA regulations as establishing a full shift of responsibility for purposes of §452(2) is to ignore the preface to the longshoring regulations which states:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, . . . *Nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

29 C.F.R. *§1918.21(b) (emphasis added). See Blackburn v. Prudential Lines, Inc., supra.* Appellant fails to convince us that common law negligence doctrine has been preempted by the OSHA regulations.[3]" (636 F. 2d 865).

We also quote the footnote to the foregoing because it points up the essential reasons why petitioner was so harmed by the court's charge in the instant case:

> "3. Therefore, the court below was correct to inform the jury of the OSHA regulations as evidence of a stevedore's duties and the care with which a shipowner could legitimately expect a stevedore to proceed; but, it properly cautioned the jury that particular circumstances might indicate to a reasonably prudent shipowner that such an assumption was unwarranted, in which case the regulations did not subtract from the vessel owner's common law responsibility." (636 F. 2d 865).

The petitioner respectfully submits that given the insulation of the stevedore from the consequences of his misconduct if any and the brooding omnipresence of collusion by the stevedore

and the vessel-owner because of the competitive nature of the stevedoring industry that OSHA regulations are irrelevant to vessel-owner's liability and their utilization with the further claim of force of law carries with it a heavy prejudicial burden. Yet if they are to be admitted into evidence then the court has a duty to do as the court did in *Di Rago* and caution the jury that even if the violation of the regulations was the cause of the accident the regulations did not subtract from the vessel-owner's common law responsibility.

CONCLUSION

In sum total the issue as originally presented to this Court simply put, is whether a violation of OSHA regulations which causes an accident ultimately exculpates the vessel-owner as mandated by the court's charge or whether the court apart from generalities must specifically caution the jury that the vessel-owner can nevertheless be liable if it has created the circumstances which begat the stevedore's violations by creating an unnecessary hazard which the stevedore could not cope with. Anything less runs contrary Congress' reluctance to entrust the safety of longshoremen to the stevedore alone. *Di Rago v. American Export Lines, Inc.*, 636 F. 2d 860, 864 (3d Cir. 1980). *See also, Turner v. Japan Lines Ltd. et al.* (opinion attached) 9th Cir. (July 27, 1981).

Respectfully submitted,

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APPENDIX

EXTRACT FROM COURT'S CHARGE

You have heard testimony regarding the safety and health regulations for longshoring. They apply only to stevedoring companies and they are rules, the so-called OSHA rules, which the stevedoring companies such as plaintiff's employer must follow in conducting their work aboard vessels. If you find that plaintiff's employer failed to follow these regulations and that this failure was the sole cause of the accident, then you must find for the defendant.

Finally, if you find that the ship owner was in some measure negligent but you also find that the plaintiff himself was in some measure contributorily negligent, then you will have to make a determination as to the extent of the plaintiff's contributory negligence.

This case is governed by a statute passed by the United States Congress called the Longshoremen's and Harbor Workers' Compensation Act. In passing this law Congress expressed its concern with the enforcement of safety conditions in longshoring work. Accordingly, the law requires every stevedore to furnish and maintain places of employment aboard ships which are reasonably safe for its employees. The stevedoring company is required by law to furnish, maintain and use such safeguards with respect to the working conditions of its employees as are reasonably necessary to protect the life, health and safety of such employees and to prevent injury to the longshoremen. The stevedore and not the vessel owner is most intimately familiar with the procedures to follow in order to safely load, unload and shift cargo and the major responsibility for the proper and safe conduct of the work is to be borne by the stevedore.

Extract from Court's Charge

The vessel has no general duty continually to supervise the activities of the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore in the course of its operations, at least when the vessel has no knowledge of the dangerous conditions.

The law, however, also imposes a responsibility on vessel owners and charges them with a duty to exercise reasonable care under the circumstances, in furnishing a safe place for the longshoremen to work.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *THOMAS W. GRIFFITH v. WHEELING-PITTSBURGH STEEL CORPORATION v. AMERICAN COMMERCIAL LINES, INC.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH,
Appellant in No. 78-2159
Appellee in Nos. 78-2160/61

v.

WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant in No. 78-2160
Appellee in Nos. 78-2159 and 78-2161

v.

AMERICAN COMMERCIAL LINES, INC.,
Appellant in No. 78-2161
Appellee in Nos. 78-2159/60

(Western Dist. of Penna. D.C. Civil No. 73-0706)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
No. 79-813

Submitted:
Before: GIBBONS, WEIS and HIGGINBOTHAM,
Circuit Judges
(Opinion Filed: August 11, 1981)

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Opinion

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*

This case is before us on remand from the Supreme Court, which on May 4, 1981 granted certiorari to review our decision in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979) vacated our judgment, and remanded for further consideration in light of its decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. , 49 U.S.L.W. 4405 (1981). The parties were requested to file supplemental briefs addressed to the effect of the *Scindia* case on our judgment. Having considered those briefs and the several opinions filed in *Scindia* we conclude that our prior judgment is consistent with the Court's interpretation of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (hereafter "the Act"), and should be reinstated.

In our most recent opinion[1] we held that the district court judgment against Wheeling-Pittsburgh in favor of

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1. Earlier this court reversed an award of summary judgment to Wheeling-Pittsburgh. *See* 384 F. Supp. 230 (W.D. Pa. 1974), *rev'd*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), *on remand*, 452 F. Supp. 841 (W.D. Pa. 1978).

the plaintiff must be vacated and remanded for further findings as to Wheeling-Pittsburgh's status as an owner *pro hac vice*. That decision is in no way affected by the Supreme Court's remand. We also held that the district court properly rejected Wheeling-Pittsburgh's claim that if it is an owner *pro hac vice*, it should be fully indemnified by the actual owner, American Commercial Lines, Inc. That holding likewise is unaffected by the Supreme Court's remand. We held, too, that if Wheeling-Pittsburgh is determined on remand to be an owner *pro hac vice*, it and American Commercial Lines, Inc. would be jointly and severally liable to the plaintiff, but the amount for which each would be liable must be redetermined because Wheeling-Pittsburgh would not be liable for contribution for negligence attributable to it in its capacity as a stevedore rather than as owner *pro hac vice*. The Supreme Court's remand in no way affects that holding. Finally, we held that American Commercial Lines, Inc. was negligent in delivering a barge with a defective cover mechanism knowing that workers such as the plaintiff would be thereby exposed to an unreasonable risk of injury for those defects. Only this negligence holding is within the contemplation of the Supreme Court's remand, since we noted in our last opinion, "Wheeling does not contest that, if it was properly held to be an owner *pro hac vice*, it was guilty of negligence in that capacity." 610 F.2d at 127. It did not petition for certiorari, and concedes in its supplemental brief that the only question open to it on remand is its status as an owner *pro hac vice* (Brief of Wheeling-Pittsburgh on Remand at 5). Thus the only question presented by the remand is whether *Scindia* requires us to reconsider our affirmance of the district court's holding that American Barge Lines, Inc. was negligent.

Our interpretation of Section 5(b) of the Act, 33 U.S.C. §905(b), was as follows:

> The sounder approach, we think, is to recognize that §905(b) imposes on vessel owners the same

> duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business. . . . Proceeding from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.
>
> At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board the ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

610 F.2d at 125-26. Reviewing the district court's application of the standard of reasonable care under all the circumstances, we held that each of these three criteria had been found and that the findings were not clearly erroneous. In particular the court found, and the evidence supported the findings, that American Commercial Lines, Inc. knew of the defective condition of the hatch cover, and was aware that Wheeling-Pittsburgh regularly used a method of removing stuck barge covers which would expose longshoremen to risk of harm. 610 F.2d at 126.

The holding of *Scindia* is that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that *develop* within the confines of the cargo operations that are assigned to the stevedore." 49 U.S.L.W.

at 4410 (emphasis added). The case involved a dangerous piece of equipment on the vessel, not found to have been brought to the vessel owner's attention prior to commencement of stevedoring operations, and also improvident use by the stevedore of that equipment, not found to have been anticipated by the vessel owner. In this context, the Court ruled that "as a general matter" the vessel owner was entitled to assume that the stevedore would discover patent defects and avoid the risk they presented. *Id.* 4409. Here, by contrast the district court found that prior to turning control of the barge over to the stevedore, American Commercial Lines, Inc. knew or should have known of the defect, and had reason to believe that Wheeling-Pittsburgh might use a negligent method to remove stuck hatch covers, but took no steps to prevent harm to the injured longshoreman. Thus *Scindia* is clearly distinguishable from this case.

Moreover, we find in the Court's decision support for our interpretation of Section 5(b) quoted above. Referring to the duty owed by a vessel to longshoremen before cargo operations began, Justice White described it thus:

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be

> obvious to or anticipated by him if reasonably competent in the performance of his work. 394 U.S. at 416 n.18. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care he has breached his duty and is liable if his negligence causes injury to a longshoreman.

49 U.S.L.W. at 4408. While the quoted language does not deal with the precise situation in this case, of a shipowner with actual knowledge of a defect and a reasonable ground for believing that the stevedore will not remedy the resulting unsafe conditions, it is certainly consistent with the imposition of liability in such circumstances. That interpretation of the opinion of the Court is confirmed by Justice Brennan's concurring opinion:

> My views are that under the 1972 Amendments: (1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) *if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition*, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.

> Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.

49 U.S.L.W. at 4412. (Emphasis supplied).

Even if it remains jointly liable with Wheeling-Pittsburgh *qua* owner *pro hac vice*, American Commercial Lines, Inc. nonetheless submits that its potential share of liability is reduced by *Scindia* because of the significance that decision attaches to a vessel's knowledge of the negligence of the stevedore. American argues that its share of the total award must necessarily be less than Wheeling-Pittsburgh's if the latter's agent had actual, rather than constructive, knowledge of the stevedore crew's poor judgment shortly before the accident happened. However, we discern nothing in *Scindia* which requires that the calculation of comparative fault mirror distinctions between actual and constructive knowledge to the exclusion of all other factors.

The judgment of this court entered upon our opinion reported at 610 F.2d 116, dated August 24, 1979, will be reinstated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *LAWRENCE A. SARAUW v. OCEANIC NAVIGATION CORP.*

MARIS, *Circuit Judge*

This appeal from the district court's award of damages to a longshoreman in his action against a vessel and its owner in which appeal we entered a judgment on May 20, 1980, is again before us, the Supreme Court having, on the grant of the defendants' petition for a writ of certiorari, vacated our judgment and remanded the appeal to us for reconsideration in the light of that Court's recent decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. (1981).

Lawrence A. Sarauw, a longshoreman dock worker employed by Hess Oil Virgin Islands Corporation (hereafter Hess), brought this action in the district court against the vessel, VLCC ANDROS ATLAS, and its owner, Oceanic Navigation Corporation (hereafter Oceanic), pursuant to section 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C.A. §905(b). That section provides that a longshoreman sustaining injuries attributable to the negligence of the personnel of a vessel may sue the vessel for damages. Sarauw alleged that due to the negligence of the officers of the ANDROS ATLAS in failing to secure to the deck of the vessel the gangway connecting the vessel with the Hess Terminal's No. 3 dock where the ANDROS ATLAS was discharging crude oil, the gangway, when Sarauw attempted to board the vessel by means of it, fell to the dock, Sarauw thereby sustaining the injuries complained of.

After a trial lasting four days, a jury found that Oceanic was negligent, that Sarauw was contributorily negligent, that Hess also was negligent, and that Sarauw's total damages were $190,800.00. The district court, on March 27, 1979, entered judgment for Sarauw reducing the total damages found by the jury by 50%, the jury having determined the degree of fault of Sarauw and

Hess to be 25% each. Following the district court's denial, on June 8, 1979, of Sarauw's motion for judgment notwithstanding the verdict and to amend the judgment and Oceanic's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, both parties appealed.

With respect to Sarauw's appeal, we held that the district court's 25% reduction of damages for Hess' negligence was error under *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Our ruling on that issue was not contested by Oceanic. As to the issues raised by Oceanic on its appeal, on the question of Oceanic's duty of care we concluded that there was sufficient evidence from which a jury could find that Oceanic retained a duty of care with respect to the gangway notwithstanding that it was supplied by Hess, and that Oceanic breached its duty of care. On the question of the district court's instructions based on sections 343 and 343A of the Restatement (Second) of Torts, we held that any error in applying to Oceanic the duty of care set forth in those sections of the Restatement benefited Oceanic and was not ground for reversal of the district court's judgment against Oceanic. With respect to Oceanic's contention, not raised in the district court, that elements of damages awarded Sarauw were duplicative, we held that no reviewable, plain error had been committed. Pursuant to the above rulings, we affirmed that part of the district court's judgment which denied Oceanic's motion for judgment notwithstanding the verdict or for a new trial and vacated that part of the judgment which denied Sarauw's motion for judgment notwithstanding the verdict and to amend the judgment. We remanded the case to the district court with instructions to enter a new judgment restoring the deduction from the jury's damages award made for Hess' negligence.

Oceanic then applied to the Supreme Court for a writ of certiorari. The writ was allowed on May 4, 1981.

and on the same day the Supreme Court vacated our judgment and ordered our reconsideration of the cause in the light of the Court's recent rulings in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. (1981), explicating the extent of a vessel's duty of care to longshoremen under 33 U.S.C.A. §905(b). Counsel, at our request, have submitted briefs on the issues raised by the remand.

The facts of the case are set out in our earlier opinion, 622 F.2d 1168 at p. 1171, and we need not repeat them here.

The *Scindia* case gives us no reason to reconsider our conclusion on the damages issue raised by Oceanic's appeal and our position on that issue, stated above, remains unchanged. We, accordingly, proceed to address the liability issues presented by Oceanic's appeal in the light of the ruling of the Supreme Court in *Scindia*. In that case the Court pointed out that under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, particularly §905(b), "Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." 451 U.S. at p. . "We are of the view," the Court went on to say, "that absent contract provision, positive law or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself." 451 U.S. at p. .

The precise question which this case presents on remand is whether the gangway here involved which was supplied by the stevedore and used by its longshoremen was an appliance which was "within the confines of

the cargo operations" assigned to the stevedore within the meaning of the rule laid down in the *Scindia* case and, therefore, outside the general duty of the shipowner to use reasonable care to inspect and supervise for the purpose of discovering and remedying dangerous conditions which might exist or develop in the course of its use. We do not think that the gangway involved in this case falls into that category. Conceivably, there might be a case in which a special gangway, which is in addition to the ship's regular gangway, is supplied by a stevedore for the exclusive use of its longshoremen in carrying out its cargo operation and which, therefore, might be regarded as wholly within the confines of that operation under the *Scindia* rule. But this is clearly not such a case.

Here the stevedore, Hess, which was the owner of the marine terminal at which the ANDROS ATLAS was unloading, required all vessels unloading at its terminal to use only gangways supplied by it, the stevedore. Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in the sense that it was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land. *The Admiral Peoples*, 295 U.S. 649 (1935). We are, accordingly, satisfied that *Scindia* does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured longshoreman. *Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866, 870 (1st Cir. 1974).

Opinion

Oceanic argues in its brief on remand that under *Scindia* a shipowner's ordinary duty of care may be modified by contract and that in its "contractual undertaking with Oceanic, Hess obligated itself to . . . furnish, secure, maintain and monitor the gangway to be used on Oceanic's vessel." We are not convinced, however, that *Scindia* instructs that a shipowner may contract away its duty of care with respect to such an essential appurtenance of the ship as the gangway. Moreover, while there was evidence in the record that Hess instructed its personnel to monitor the safety of the gangways of the ships docked at its terminal, there was no evidence of an agreement under which Hess undertook to relieve the ANDROS ATLAS of its legal obligation concerning the gangway here involved.

In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading. We remain satisfied, as we were when the case was here before, that the instructions fairly presented this issue to the jury and that Oceanic's motion for judgment notwithstanding the verdict or for a new trial was properly denied. The other issues are discussed in our former opinion and are not involved in this remand. We, therefore, need not discuss them here.

The judgment entered by this court in this case on May 20, 1980 will be reinstated.

Opinion

ADAMS, *Circuit Judge*, concurring.

I agree that our previous judgment in this case should be reinstated, but I write separately to illustrate why, in my view, the reasoning in the prior opinion is consistent with *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 490 U.S.L.W. 4405 (U.S. Apr. 21, 1981).

Although the thrust of the opinion in *Scindia* is to restrict the shipowners' liability to longshoremen injured in the midst of stevedoring operations, the case does not proclaim that a vessel may never be found negligent in connection with mishaps suffered by longshoremen. The Supreme Court crafted at least two exceptions to the freshly promulgated policy against holding the shipowner responsible. First, the Court noted that it is "accepted that the vessel may be liable . . . if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation." 49 U.S.L.W. at 4408. Second, the Court indicated that in some circumstances "positive law or custom" may impose on the shipowner "a duty of supervisory inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations." 49 U.S.L.W. at 4410.

Both of these principles are directly applicable to the case at hand. In our initial opinion we held that the shipowner maintained control over the manner in which the gangway was to be secured. 622 F.2d 1168, 1172 (3d Cir. 1980). Relying on testimony by the plaintiff's expert, which was corroborated by the ship's captain and second officer, we also affirmed the trial court's finding that the evidence established a duty on the part of the shipowner to secure, maintain, and watch over the gangway. *Id.* at 1172. The source of this duty is the custom of "good seamanship" and the tradition of maritime law. The present case therefore comes within the cir-

cumstances delineated in *Scindia*, under which the shipowner may be found liable for injuries to longshoremen occurring during stevedoring operations. The vessel owner did not exercise due care with regard to the gangway area, which remained under the vessel's active control, *see* 490 U.S.L.W. at 4408; and, the custom of admiralty dictates that the shipowner had a continuing duty to watch over and inform itself about hazards involving the gangway and the manner in which it was fastened to the ship, *see* 49 U.S.L.W. at 4410. Although this duty to inspect and supervise may be shared with the stevedore by contract, according to the trial testimony the shipowner may not transfer the ultimate responsibility.

The vessel owner argues that *Scindia* hinged on a distinction between equipment owned by the vessel and items owned by the stevedore. The previously quoted language in the Supreme Court's opinion, which emphasizes control and duty, rather than ownership, is at variance with the shipowner's interpretation of *Scindia*. Control over the defective condition remains a crucial factor in imposing liability. This conclusion is consistent with the policy underlying the Supreme Court's decision. The Court disparaged rules that would "result in holding the shipowner solely liable for conditions that are attributable to the stevedore." 49 U.S.L.W. at 4409. This result would come about when the owner has no control over a defective condition. When the owner retains a measure of control, however, a defect cannot fairly be attributed solely to the neglect of the stevedore. In the present case, for example, the jury found that both the stevedore and the owner had some control over the gangway and that both negligently breached their respective duties to monitor the way in which the gangway was attached to the ship.

Because our initial opinion in this matter correctly presaged the role the Supreme Court assigned in *Scindia* to control by the vessel owner over the area in

question and to a customary duty to inspect, it remains viable. I therefore agree that the judgment for Sarauw must be reinstated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *TURNER v. JAPAN LINES, LTD.*

JAMES TURNER,

Plaintiff-Appellant and Cross-Appellee,

v.

JAPAN LINES, LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Defendants-Appellees and Cross-Appellants.

Nos. 79-4060, 79-4062 and 79-4182

Unites States Court of Appeals,
Ninth Circuit

Argued and Submitted Dec. 11, 1980

Decided July 27, 1981

Off-loading longshoreman, who was injured when a defective stow collapsed, brought action against owner and time-charterer of the vessel. The United States District Court for the District of Oregon, Otto R. Skopil, Jr., J., granted judgment, n.o.v., in favor of the owner and time-charterer, and the longshoreman appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) owner and time-charterer had a duty to protect the off-loading longshoreman from concealed dangers created by foreign loading stevedore which could have been corrected or warned of, in the exercise of reasonable care; (2) evidence that owner and time-charterer knew or should have known that the stow was unreasonably dangerous to off-loading longshoremen and that the defect could not have been

discovered by them was sufficient to support jury's verdict in favor of the off-loading longshoreman; and (3) under clause of the charter party between the owner and time-charterer making the time-charterer responsible for the "load, stow, trim and discharge" of the cargo and liable for any injuries to cargo or longshoremen resulting from the improper performance of such operations, time-charterer was responsible for injuries sustained by the off-loading longshoreman and, therefore, the time charterer had to indemnify the owner of the vessel for any damages paid to the off-loading longshoreman.

Reversed and remanded.

1. Shipping 84(3)

Owner and time-charterer of vessel had duty to protect off-loading longshoreman from concealed dangers created by foreign loading stevedore which could have been corrected or warned of, in the exercise of reasonable care. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b).

2. Shipping 86(2¾)

Evidence that owner and time-charterer of vessel knew or should have known that stow was unreasonably dangerous to off-loading longshoremen and that the defect could not have been discovered by them was sufficient to support jury's verdict in favor of off-loading longshoreman, who was severely injured when the defective stow collapsed. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b).

Opinion

3. Indemnity 8(4)

Under clause of charter party between owner and time-charterer of vessel, making the time-charterer responsible for the "load, stow, trim and discharge" of the cargo and liable for any injury to cargo or longshoremen resulting from the improper performance of such operation, time-charterer was responsible for injuries sustained by off-loading longshoreman, who was severely injured when a defective stow collapsed, and, therefore, time-charterer had to indemnify the owner of the vessel for any damages paid to the off-loading longshoreman.

Appeal from the United States District Court for the District of Oregon.

Before FLETCHER and FERGUSON, Circuit Judges, and GRANT, District Judge.*

FLETCHER, Circuit Judge:

These are appeals and cross-appeals from a judgment n.o.v. for defendants Japan Lines and Philippine President Lines, following a jury trial in which plaintiff-appellant Turner received a verdict for $955,976.11. Turner appeals from the grant of judgment n.o.v.; Japan Lines and Phillippine President Lines cross-appeal to attack the jury verdict, if it should be reinstated.

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* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

Opinion

I

FACTS

Turner was a longshoreman in Longview, Washington. On June 13, 1974, he was unloading plywood from the PRESIDENT QUEZON when a stack of plywood in the hold collapsed beneath him. Turner incurred serious injuries, and as a result now suffers from an apparently untreatable form of epilepsy.

The vessel PRESIDENT QUEZON is owned by Phillipine President Lines (Owner). At the time of Turner's accident, the vessel was time-chartered to Japan Lines, Ltd. (Time-Charterer) under the New York Produce Exchange charter party. The cargo of plywood was loaded on the PRESIDENT QUEZON in Kushiro, Japan by Mitsuwa Transport Co., a stevedore, pursuant to a contract with the Time-Charterer. Another Japanese firm was engaged to shore and lash the cargo, and the completed stow was inspected by a licensed Japanese marine surveyor.

At trial, Turner produced evidence to show how stacks of plywood should be stowed in the hold of a ship and how the plywood on which he was injured was improperly stowed. According to the testimony, the hull of the vessel curves outward and upward from the deck of the lower hold. This concave curvature is called the "sheer" of the ship. When bundles of plywood are stowed against the sheer, the first stack of bundles (three or four feet thick) is butted against the sweat battens, which protect the cargo from contact with the bare hull. Dunnage (lengths of scrap lumber) is placed on top of the stack to separate it from the stack above, so that when the cargo is unloaded the forks of lift trucks can be fitted between them. The

next stack of plywood is placed atop the dunnage and butted against the sheer. This stack rests only partially on the first stack; part of it is unsupported from below because of the outward curve of the sheer. In order to prevent the stack from tipping under the weight of workers or of the stacks on top of it, it must be "shored" from below. The shoring consists of vertical lengths of lumber nailed upright between the dunnage timbers and the sweat battens of the hull. The shoring, or lack of it, is invisible to the offloading longshoreman until the plywood it supports is removed.

The evidence showed that no nails were found in the pile of lumber under the collapsed plywood after the accident. Expert testimony indicated that it should be inferred from this that the shoring had not been constructed properly. There was also evidence that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman.

Witnesses testified that many hours of work by marine carpenters would have been required to build proper shoring. The vessel's log indicates the time at which the marine carpenters who constructed the shoring entered the hold. This, according to plaintiff, indicates that the master or one of the mates was aware that the shoring work had begun, and had ample opportunity to monitor it.

Plaintiff also called expert witnesses who testified as to the duties of the master of the ship in overseeing the stow of the cargo. The experts testified that the master's primary duty is to protect the seaworthiness of the vessel and the safety of the crew and passengers. The master is also responsible for the safety of the cargo and those who unload it. The master or one of his mates is always on watch on the vessel. The experts also testified that the master or one of his mates is responsible for overseeing the loading operations and particularly for ensuring that the cargo is properly shored.

Opinion

The evidence showed that Turner was injured when he was standing atop three stacks of plywood, nine to twelve feet above the deck of the hold. He was in the process of rigging the ship's hoisting gear to the top stack of plywood when the stack tipped beneath him. The falling stack knocked the stacks underneath it away from the sheer of the hull, and the entire stack collapsed. Turner was struck on the head.

This testimony was uncontradicted by defendants, who submitted only documentary evidence. The magistrate instructed the jury that the Owner or the Time Charterer or both would be liable to the plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and of the danger it posed. The magistrate also submitted to the jury the question whether, if the master of the vessel was found to have been negligent, he was acting for the Owner or the Time-Charterer or both. The jury returned its verdict for plaintiff against both defendants.

After the jury returned its verdict, the magistrate granted judgment n.o.v. to the defendants on the authority of *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977). It is unclear from the order granting judgment whether the magistrate considered the evidence insufficient to go to the jury on the question of negligence, or whether he concluded that defendants had no duty to plaintiff as a matter of law.

The questions presented for our review are:

(1) whether the defendant(s) owed any duty to the plaintiff under the circumstances of this case;

(2) if so, whether the evidence was sufficient to support the jury's verdict;

(3) if so, whether under the charter party, the Owner or the Time-Charterer or both are liable to plaintiff for his injuries.

II.

NEGLIGENCE

A. Vessel's Duty to Longshoremen

This case arises under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b) (1976). That section, as amended in 1972, gives an injured longshoreman a cause of action against a "vessel" for its negligence. "Vessel" is defined to include the vessel's "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." 33 U.S.C. §902(21). However, since the 1972 amendments the longshoreman no longer has an action against the vessel for unseaworthiness, a type of liability without fault. *Compare Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *with Scindia Steam Navigation Co. v. de los Santos,* ___U.S.___, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981).[1]

1. Considerable controversy has arisen over what constitutes "negligence" as opposed to "unseaworthiness." Some commentators have suggested that the difference between the two causes of action is slight, since most unseaworthy conditions are the result of someone's negligence. *See e.g.,* G. Gilmore & C. Black, *The Law of Admiralty* 452-55 (2d ed. 1975). The two situations in which an injured longshoreman can no longer recover from the vessel would seem to be (1) where the injury is the result of a condition of which the vessel has no notice or opportunity to correct, and (2) where the injury is caused entirely by the negligence of a third party, *e.g.,* the longshoreman's stevedore-employer. *Id.* at 452. This interpretation comports well with the purposes of the 1972 amendments. *See* H.R.Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4699, 4703-05.

Opinion

The Supreme Court has recently held that negligence under §905(b) is to be measured by the general maritime standard of reasonable care under the circumstances, and that

> [t]his duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia Steam Navigation Co. v. de los Santos, 101 S. Ct. at 1621. *Scindia* involved a longshoreman who was injured by an allegedly defective winch during offloading operations. The shipowner there contended that it had no duty to repair the ship's equipment once the stevedore had commenced work. The Court rejected this contention, holding that if the shipowner was or should have been aware of the winch's condition and of the unreasonable risk of harm to the longshoreman, and if it were clear that the stevedore would not or could not remedy the problem, the shipowner would have a duty to intervene. *Id.*

The defendants here argue that neither the Owner nor the Time-Charterer had any duty to supervise the activities of the loading stevedore, so that neither can be held liable to an offloading longshoreman for injuries which result from the

loading stevedore's negligence. We have found one decision apparently adopting this view. *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977).

There are, to be sure, other cases in which courts have rejected attempts by longshoremen to recover from a vessel for failure to supervise the work of the stevedore. With the exception of *Ruffino*, however, those cases involve injuries incurred during stevedoring operations and allegedly caused by the injured *employee's* stevedore-*employer's* negligence. In this context, the Supreme Court in *Scindia* and the circuits in numerous cases have reviewed the reasons why, under the amended Act, it would be undesirable to impose liability on the shipowner for failing to supervise minutely the stevedore-employer's operations. *See, e.g., Scindia Steam Navigation Co. v. de los Santos*, ____U.S.____, 101 S. Ct. 1614, 1622-24, 68 L. Ed. 2d 1 (1981); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d 837, 840-41 (2d Cir. 1977). The shipowner, after the 1972 amendments, no longer has a right over against the stevedore-employer for its concurrent negligence. 33 U.S.C. §905(b); *Scindia Steam Navigation Co. v. de los Santos*, 101 S. Ct. at 1624; *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d at 841. However, if the longshoreman recovers from the vessel in a negligence action, the stevedore-employer can then recover from the longshoreman the value of the compensation payments made to him. 33 U.S.C. §933. Thus, the stevedore-employer would be effectively relieved of any liability, even if it were primarily at fault. This result would remove any incentive to the stevedore to improve the safety of its operations, thus vitiating one of Congress' goals in enacting the amendments. *Scindia Steam Navigation Co. v. de los Santos*, 101 S. Ct. at 1629 (Powell, J., concurring); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d at 841.

This concern may be justified, but it has no relevance to the case before us. The third party that is primarily negligent is not the plaintiff's employer, but rather the Japanese stevedore (the negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese stevedore). Section 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the "employer" as defined in the Act. 33 U.S.C. §902(4). Second, the fact that the plaintiff's stevedore-employer will be able to recover the compensation payments it has made does not in any way diminish its incentive to maintain safe operations. The posited negligence here is that of the foreign stevedore; the parties agree that the stevedore-employer could not have prevented this accident by any exercise of care.

[1] To the contrary, imposing a duty on the Owner or Time-Charterer or both in this case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a

foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.[2]

B. Sufficiency of the Evidence

[2] The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.

This court will not disturb a jury's verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict—that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability." *Kunz v. Utah Power & Light Co.*, 526 F. 2d 500, 504 (9th Cir. 1975). *See also, California Computer Products, Inc. v. International Business Machines Corp.*, 613 F. 2d 727, 734 (9th Cir. 1979).

As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the "seaworthiness" of the vessel, a concept supposedly irrelevant under §905(b). This argument, however, misses the point. The experts testified not about legal conclusions ("unseaworthiness" or "negligence") but about custom in the industry with respect to the master's duties. Furthermore, the master *is* responsible for the seaworthiness of the vessel; he is simply not liable without

2. To the extent that this holding is inconsistent with the result reached in *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977), we must, for the reasons given above, disagree with the Second Circuit.

fault to injured longshoreman. *See, e.g., Nichimen Co. v. M.V. Farland,* 462 F. 2d 319, 331-32 (2d Cir. 1972). Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.

The Supreme Court in *Scindia* observed that a "necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel." 101 S. Ct. at 1626 (emphasis added). We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo.[3] Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not have been discovered by them.

We hold that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judment n.o.v. to defendants.

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3. The plaintiff also argues that he is entitled to the benefit of an inference against defendants because they failed to produce the testimony of Captain Pucan, the master of the vessel. Defendants had apparently notified plaintiff of their intent to produce Captain Pucan, and in fact he was present at the trial. Defendants put on no evidence at trial and neither plaintiff nor defendants called Captain Pucan. We need not address this argument because we hold that the plaintiff's evidence was sufficient to support the verdict without this inference.

III

INDEMNITY

Having decided that the "vessel" negligently caused plaintiff's injuries, we must determine whether the liability falls on the Owner, the Time-Charterer, or both. The magistrate asked the jury to decide whether, under Clause 8 of the charter party,[4] the master was acting for the Owner or the Time-Charterer when he failed properly to supervise the cargo operations. The jury responded by holding both defendants liable.

We think that the trial court misperceived the question, and that it was error to ask jury to interpret the contract. First, the contract was not relevant to the *duty* owed by either defendant to the plaintiff. *Cf. Scindia Steam Navigation Co. v. de los Santos,* 101 S.Ct. at 1626 (contract between vessel and stevedore relevant to vessel's responsibility for safety of stevedore's employees). The question was put to the jury, and the jury decided, that the *vessel* was negligent in either its supervision of the loading operations or its failure to warn plaintiff of a dangerous condition, or both. The vessel discharged its duties through the master, who was an agent of both the Owner and

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4. Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

the Time-Charterer under the charter party. Thus, inasmuch as the jury decided that the loading operations were negligently supervised, it was correct to hold both the Owner and the Time-Charterer liable. It was not up to plaintiff to prove, as between the defendants, which party had contracted to bear the responsiblity for loading and unloading operations.

Second, the interpretation of the contract in this context was a question of law and should have been decided by the court. *See, e.g., Migut v. Hyman-Michaels Co.*, 571 F. 2d 352 (6th Cir. 1978); *Fernandez v. Chios Shipping Co.*, 542 F. 2d 145, 151-53 (2d Cir. 1976). Since the trial court has not considered the question, this court is entitled to do so in the first instance. *See East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F. 2d 524, 529 (9th Cir. 1972).

[3] The issue before us is whether Clause 8 of the charter party entered into by the defendants places the responsibility for injuries to longshoremen caused by the negligent supervision of cargo operations on the Owner or on the Time-Charterer. The charter party in question, the New York Produce Exchange form, is widely used and has been construed frequently by the courts. *See, e.g, Fernandez v. Chios Shipping Co.*, 542 F. 2d 145 (2d Cir. 1976); *Nichimen Co. v. M.V. Farland*, 462 F. 2d 319, 330-34 (2d Cir. 1972). *See generally* G. Gilmore & C. Black, *The Law of Admiralty* 229-39, 1003-10 (2d ed. 1975); M. Wilford, T. Coghlin, & N. Healy, *Time Charters* 137-42 (1978). The Second Circuit in *Fernandez* faced the identical issue. It held that Clause 8 of the charter party, which makes the time-charterer responsible for the "load, stow, trim and discharge" of the cargo, *see* note 4 *supra*, also makes the time-charterer primarily liable for any injury to cargo or longshoremen which results from the improper performance of those operations. *Id.* at 151-53.

Opinion

We agree with the decision of the Second Circuit.[5] Because plaintiff's injury was caused by improper loading of the cargo, we hold that the Time-Charterer must indemnify the Owner for any damages paid to plaintiff.

REVERSED and REMANDED for proceedings consistent with this opinion.

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5. Defendant Time-Charterer argues that the Fifth Circuit reached a contrary conclusion in *D/S Ove Skou v. Hebert*, 365 F. 2d 341, 351-52 (1966). That case was decided prior to the 1972 amendments to the LHWCA. The court denied the owner indemnity from the time-charterer for damages owed to an injured longshoreman, under Clause 8 of the charter party. *See id.* at 344 n. 5. The court held that the time-charterer made no warranties to the owner that the stevedores hired by the time-charterer would perform in a workmanlike manner. The jury had found that the owner negligently maintained its ship in a defective condition, and that the stevedore negligently failed to discover the condition and correct it. In contrast, in the case at bar the negligence found by the jury occurred in the course of precisely those operations for which the time-charterer had assumed contractual responsibility. The defect was not one in the ship's equipment, as it was in *Hebert*. Had it been, we would certainly reach a different result, since the Owner expressly warranted in the charter party that it would maintain the ship in a seaworthy condition.